MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Recent Regulatory Initiatives

Date: August 9, 2007

I am providing an analysis of four (4) regulatory initiatives for the consideration of the SCPD. Given the paucity of significant proposed standards in the August issue of the Register of Regulations, I understand the Policy & Law Committee meeting has been cancelled and that the Executive Committee will act on this memo.

1. DOE Final Special Education Eligibility Regulations [11 DE Reg. 184 (August 1, 2007)]

The SCPD and GACEC submitted extensive commentary on the proposed version of these regulations in June, 2007. The Department of Education has now adopted final regulations with some amendments. The Department acknowledged receipt of the GACEC comments but not the conforming SCPD comments. I attach a copy of the SCPD's June 29 memo for facilitated reference.

First, the Council endorsed the "phase in' of the new evaluation standards such that currently-eligible students would not be automatically reassessed outside the normal 3 year schedule. The Department did not mention the endorsement.

Second, the Council objected to limiting visual impairment eligibility to only "diseases" and recommended including "condition" or "impairment". The Department agreed and amended §6.17.2 to refer to "disease, condition, or impairment of the eye or visual system".

Third, the Council noted that the eligibility standard for partially sighted students in §6.17.3 was stricter than that contained in §6.17.2. The Department amended the regulations to achieve consistency.

Fourth, the Council noted that §7.2 discouraged intelligence testing in the context of LD assessment. The Department responded that the standards still allow such testing and noted "intelligence testing is not necessarily informative of whether a child has a learning disability." No amendment was effected. I continue to disagree with the view that intelligence testing is generally immaterial or not useful in assessing whether a child has a learning disability.

Fifth, the Council recommended that the current practice of requiring the participation of a school psychologist in an LD assessment be continued. The Department made no change and noted that participation of school psychologists will be optional.

Sixth, the Council recommended that the assessment not be solely limited to whether a student meets age and grade level standards. The Department did not address the comment. No amendment was effected.

Seventh, the Council objected to the Kafkaesque prereferral intervention process which allows an entire year to elapse prior to referral of a struggling child for a special education assessment. The Department responded that "invaluable information" will be gathered through the RTI process.

Eighth, the Council observed that parents are authorized to request that the RTI process be bypassed in favor of a special education evaluation. However, the regulations contemplated no notice to parents of this right. The Department did not respond to this observation.

Ninth, the Council observed that the proposed regulation categorically ended a student's special eligibility upon the student's 21st birthday. This was much stricter than the superseded AMSES which allowed students turning 21 after August 31 to continue special education eligibility until the following August 31. The DOE acknowledged this concern and amended the regulations to conform to the superseded AMSES. <u>This is a major achievement since it means that many children will obtain up to another year of special education eligibility.</u>

Since the regulations are final, I recommend no further commentary on the substance of the standards. However, there is an ostensible "glitch" with the final regulations. The final regulations completely omit §§7.0, 8.0, 9.0, 10.0, and 11.0 of the published proposed regulations. This amounts to omission of approximately 2 ½ pages of regulations. The oversight is reflected in both the printed and PDF version of the final regulations. The SCPD and/or GACEC may wish to share this observation with both the DOE and the Register staff. The SCPD may also wish to inquire why the DOE ignored the SCPD's comments on this regulation and the following regulation. The APA contemplates that the DOE will issue an order which includes "a brief summary of the evidence and information submitted".

2. <u>DOE Final ESY Regulations [11 DE Reg. 181 (August 1, 2007)]</u>

The SCPD and GACEC commented on the proposed version of these regulations in June, 2007. The DOE acknowledged receipt of GACEC comments but not SCPD comments. I attach the SCPD's comments for facilitated reference. The DOE effected no amendments based on the Council's observations. The principal problem with the regulation was repeal of a regulatory note described below.

The Council strongly objected to deletion of a note clarifying that students with classifications of SMH, TMH, autism, deaf-blindness, TBI, and some physical disabilities are automatically entitled to ESY under statute [Title 14 Del.C. §1703(e)(f)]. The statute is based on the premise that such conditions are commonly recognized as severe disabilities. The DOE declined to restore the note, commenting as follows:

> The Department believes the normal school year is sufficiently defined in Title 14 of the Delaware Code, and the statute adequately addresses the specific populations being served. Given the detailed provisions in Title 14, no change to the regulation is necessary.

This response is inane. The DOE regulation is contrary to the statute It affirmatively disallows categorical statutory eligibility by exclusively limiting ESY to: 1) individual IEP team determination [§6.2]; and 2) qualification under 1 of 5 individual standards [§§6.1 and 6.5]. There is no exception for students who automatically qualify for ESY under statute. Furthermore, the rationale that the "normal school year is sufficiently defined in Title 14" is inaccurate. By statute [Title 14 Del.C. §1049], local educational agencies can establish their own school years as long as they amass a certain number of hours. For example, one district could legally adopt a 7 hour school day with 152 school days over 8 months while another district could adopt a 6 hour school day with 177 school days over 9 months. Finally, the DOE regulation does not refer to the normal school year as defined in Title 14. To the contrary, it refers to "the normal school year of the public agency " (a/k/a district or charter school). Thus, DOE's regulatory reference to "normal" or "regular" school year does not even implicitly refer the reader to Title 14 Del.C. §1703(e)(f).

I recommend that the SCPD consider preparation of a letter to the Governor (and her counsel) and/or House and Senate Education Committee members. I attach Committee membership lists. I also recommend that the SCPD solicit endorsements of the letter so that it can be submitted with a list of supporting agencies (e.g. ARC; BIA; DDC; GACEC; Easter Seal; Autism Society; PIC; DLP; CODE). At the August 6 SCPD Brain Injury Committee meeting, I believe the following agencies promptly authorized the SCPD letter to reflect their endorsement: DDC, BIA, DLP, and Easter Seal.

3. DPH Final Personal Assistance Services Regulations [11 DE Reg. 196 (August 1, 2007)]

The SCPD commented on an initial pre-publication draft of these regulations in September, 2006. The Division of Public Health then issued a second pre-publication draft in January which incorporated many, but not all, of the Council's September recommendations. The SCPD forwarded a second set of comments. In March, DPH formally published proposed regulations [10 DE Reg. 1376 (March 1, 2007)]. The SCPD reiterated fifteen (15) comments on the regulations derived from the September and January submissions. The Division has now adopted final regulations with almost no changes prompted by the Council's commentary. For facilitated reference, I have underlined the two changes prompted by the Council.

First, the Council recommended clarification of the overlapping definitions of

"companion" and "homemaker". The Division commented that it was comfortable with the existing criteria and effected no amendment.

Second, the Council recommended inclusion of "transportation" in the definition of "personal assistance services". DPH agreed and adopted a conforming amendment.

Third, the Council recommended clarification that due process protections applied to disciplinary action apart from suspension and revocation of licenses. Although the Division's comment in this context is somewhat negative (at p. 198), it did amend Section 2.4.3.1.2 to expand the scope of due process by substituting "disciplinary action" for "suspension or revocation".

Fourth, the Council recommended adoption of a minimum inspection timetable of every year. The Division opted to establish no minimum timetable. Inspections will only be "periodic".

Fifth, the Council recommended an amendment to make consumer satisfaction surveys a requirement, not an option. DPH effected no amendment based on its desire to not impose an undue burden on provider agencies. At p. 199.

Sixth, the Council noted a grammatical error in Section 4.4.2.6.6. The Division did not comment on the observation and maintained the incorrect reference.

Seventh, the Council recommended inclusion of financial safeguards in connection with shopping and running errands. The Division made no change and noted that "the consumer (or their designee) is the right person to determine this level of process detail". At p. 200.

Eighth, the Council noted that Sections 5.1.3 and 7.0 were somewhat inconsistent since the former section suggests that insurance coverage is discretionary. The Division indicated that insurance is required under Section 7.0 and perceived no inconsistency. However, Section 5.1.3 still refers to disclosure of "insurance coverage or the lack thereof" which implies that coverage is optional.

Ninth, the Council recommended inclusion of a new section with a "reminder" that the service plan must include "the scope, frequency, and duration of services". The DPH opted to not create a new section based on inclusion of this concept in the definition of "service plan".

Tenth, the Council recommended adding a requirement that the consumer sign the activity log to acknowledge that listed services were actually provided. The Division declined to effect any amendment. At p. 202.

Eleventh, the Council characterized a 30-day timeframe for the provider to submit a report on a "major adverse incident" as too long. The Division responded that reporting of the incident is required within 48 hours but the provider's investigative report will remain due within 30 days. At p. 202.

Twelfth, the Council recommended that the minimum advance notice of discharge be 30 days rather than 2 weeks to allow the consumer a reasonable time period to secure alternate coverage. The Division effected no change, characterizing 2 weeks as a compromise. At p. 202.

Thirteenth, the Council objected to the authorization for provider immediate and unilateral termination of services based on its determination that a consumer should have a higher level of care. DPH made no amendment and suggested that it contemplates that the services plan can include an orderly transition to a different level of services. In my opinion, this will be a huge "loophole" allowing providers to precipitously terminate all support services with no notice.

Fourteenth, the Council objected to the authorization to terminate all services with no notice whatsoever based on an obtuse and "flimsy" justification of any "non- compliance" with the service plan. The Division minimizes the concern (at pp. 202-203) and effects no change.

Fifteenth, the Council recommended inclusion of a requirement in the provider's insurance policy that DPH be notified of any lapse. This would be similar to the practice with homeowner insurance notices to mortgagees. The Division made no change based on its view that such a requirement would be "over-reaching and legally questionable". At p. 203.

Since the regulations are final, I recommend no further action.

4. <u>DDDS Pre-publication Proposed Discharge from DDDS Services Regulation</u>

On August 2 the Division of Developmental Disabilities forwarded a proposed regulation covering discharge from both DDDS eligibility and services. It solicited comments by August 17. I have the following observations. At the outset, I must emphasize that, given time constraints, my comments are preliminary and subject to revision and embellishment based on further research.

First, consistent with the "discharge" definition, the regulation inferably covers two situations: 1) termination of eligibility as a DDDS client; and 2) termination of eligibility from some or all DDDS services while maintaining DDDS client status. Adopting or mixing discharge standards covering both contexts in a single regulation is imprudent for several reasons.

A. The standards for termination from client status versus termination from discrete service eligibility should be quite different. For example, if the client failed to pay "justified charges" [§2.1(H)] towards residential services, the regulation [§2.1] would authorize complete termination ("discharge") as a DDDS client with no access to respite, case management, and other non-residential services. Similarly, if a client failed to submit requested paperwork concerning a single respite [§2.0(J)], the regulation directs "discharge" as a DDDS client altogether.

B. The Division is adopting a separate eligibility regulation [11 DE Reg. (July 1, 2007)] with itemized standards. By adopting a separate termination of eligibility regulation, the Division risks establishing conflicting and inconsistent standards. Indeed, discrepancies between the two proposed regulations abound. The proposed eligibility regulation does not have a "chronic care" exclusion [§2.0(E)]; an exclusion for nursing home residents [§2.0(F)]; or an exclusion for persons who may place the health, safety, or welfare of others in jeopardy or risk (e.g. sex offenders in DDDS GBHC group home [§2.0(G)]. For consistency, the Division should simply adopt a standard which recites that termination of eligibility as a DDDS client may result if a client no longer meets the standards in the eligibility regulation (which should still contain a "grandfather" provision). DDDS could then dispense with reiteration of residency, citizenship, and other criteria in a separate, prescriptive discharge regulation. The eligibility and lack of eligibility ("discharge") standards would be co-terminus.

Second, if DDDS decides to adopt a discrete "discharge from services" regulation, the current proposed model raises many concerns.

A. As a government agency, DDDS must provide notice and due process not simply for total "discharge" (termination) from services, but also other adverse, material action affecting services. Compare 16 Admin Code 5301 contemplating DHSS notice based on suspension or reduction of assistance. Cf. 18 DE Admin Code 1301, §2, defining "adverse action" triggering a notice requirement as any decision to deny (in whole or in part), reduce, limit or terminate benefits. Otherwise, DDDS could reduce services by 99% (e.g. offering 1 hour of respite annually) and claim that the "discharge" regulation [and its concomitant due process standards (§3.0)] are simply not applicable. The DDDS proposal treats any adverse action short of complete termination as immaterial.

B. Consistent with the preceding paragraph, the proposed regulation is "underinclusive" by only referring to services. If DDDS denies provision of assistive technology (e.g. helmet for client engaging in SIBS or adaptive utensils for Stockley resident), the policy would literally not apply.

C. DHSS divisions often solicit grant funds as a supplemental funding source for new or existing services. Each grant may contain specific eligibility and participation standards. The DDDS proposed regulation adopts a "one-size-fits-all" approach to eligibility and termination of services which does not account for adherence to discrete federal or foundation grant requirements. Indeed, such grants could even target non-citizens.

D. Specific programs within DDDS may have discrete eligibility and termination standards. Moreover, DDDS providers (e.g. Easter Seal) may have discrete termination standards. Adopting a single termination standard may result in inconsistency with policies related to the discrete programs or standards adopted by individual DDDS providers.

E. Section 2.0(E) literally authorizes discharge for any client who "requires skilled care

and the level of care cannot be safely provided within the DDDS residential programs". This is overbroad. This provision would anomalously render the following clients ineligible for DDDS services since they would be receiving skilled care not provided by DDDS:

> 1. a client who lives with a family and receives private duty nursing services (PDN) through a DMMA-MCO Medicaid or private insurance;
>
> 2. a client enrolled in the First State School sponsored by Christiana Care and the RCCSD;
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> 3. a client qualifying for the Children's Community Alternative Disability Program [16 Admin Code 25000] based on meeting an SNF level of care who receives DMMA-MCO Medicaid supports;
>
> 4. a client placed by the State in Voorhees; and
>
> 5. a client receiving PPEC services.

Moreover, there is nothing in the DDDS current or proposed eligibility regulation which renders an individual ineligible for DDDS because he/she requires skilled care not offered by DDDS. Adopting restrictive eligibility standards which discriminate against persons with more severe disability profiles may run afoul of Equal Protection, Section 504, and the ADA. See, e.g., Klosterman v. Cuomo, N.Y. Supr., 481 N.Y.S. 2d 580, 584 (1984) and Goebel v. Colorado Department of Transportation, 764 P.2d 785, Colo Supr. (1988) [impermissible to provide residential placements to persons with mild mental illness while denying such placement to persons with severe mental illness as class]. This principle has been recognized within the Third Circuit. In Wagner v. Fair Acres Geriatric Center, 49 F. 3d 1002, 1016n.15 (3d Cir. 1995), the Court observed as follows:

> (A)n action under Section 504 exists if a program is found to discriminate between distinct classes of handicapped persons. For instance, a program barring all severely retarded persons from a program available to mildly retarded persons may be discriminatory. See Clark v. Cohen, 613 F. Supp. 684, 693 (E.D. Pa. 1985)(holding that the claim of a denial of access to a program based on the relative aspects of the handicap (e.g. mildly retarded as opposed to severely retarded) qualifies under Section 504.

The Clark case was later affirmed. Clark v. Cohen, 794 F.2d 791 (3rd Cir.), cert denied, 107 S.Ct. 459 (1986). The principle that discrimination based upon the severity of disability is impermissible has also been endorsed in ADA litigation. See, e.g., Messier v. Southbury Training School, 1996 WL 75189 (D. Conn. 1996), relying on Helen L. v. Didario, 46 F. 3d 325 (3rd Cir. 1995).

F. Section 2.0(F) is unclear and "overbroad". In combination with the definition of "excused absence" and "unexcused absence", it is not clear whether it only applies to residential services. For example, if a client were "unavailable" for respite for a 30-day consecutive period, the client would literally be guilty of an "unexcused absence"even if respite has not been scheduled. If a client took a 31-day vacation out-of-state, and hence is "unavailable to receive DDDS services", this section would penalize the client for an "unexcused absence". Finally, the entire concept of "excused" and "unexcused" absences is authoritarian and contrary to the Division's mission statement. Why should a client have to beg approval to take a vacation from no less than 2 DDDS representatives?

G. Apart from inconsistency with "choice" and "autonomy", the 30-day absence standard [§2.0(F)] contains no standards for determining "excused" versus "unexcused" absences. Without standards, the decision-making is subjective and may be arbitrary and capricious. As applied, the standards may also have inane results. For example, if a Special Populations client elopes for 30 days, without any fault of the guardian, DDDS discharges the client. Thus, if the client reappears on the 31st day, the guardian must reapply for services while the former client remains in limbo. Alternatively, if a sex offender in the GBHC group home elopes for 30 days, DDDS would discharge the client rather than continuing efforts to locate the individual. Alternatively, the "unavailable to receive DDDS services" standard would authorize termination of access to case management, respite, and even the Stockley pool if the client exercises "choice to remain absent from the site/program" for 30 days.

H. The 30-day absence standard is onerous in linking lack of use only to termination of eligibility. There is no provision for suspension of services or "inactive status". Similarly, the standard is at odds with the concept of "retirement" which has been discussed within DDDS for elderly clients. Finally, there is no provision for expedited re-entry to services under any scenario (e.g. change of mind or circumstances). Contrast attached DMR Exit/Discharge from DMR Day Program-CARF (March, 2000) ["When an individual is discharged to Supported Employment re-entry shall be automatic within 60 calendar days"]

I. The characterization of imprisonment as an example of an "unexcused absence" merits deletion. There is nothing in the DDDS enabling legislation [Title 29 Del.C. §7909A] or proposed eligibility regulation which bars eligibility of persons in pre-trial, post-adjudication, probationary, or parole status. This is consistent with the spirit of H.B. No. 355 enacted in 2006. That bill, coauthored by DHSS and the DLP, recognized that agencies should minimize duplication of services but not bar the eligibility of persons who are also served contemporaneously by other state agencies (e.g. DVR or DOC). Indeed, DDDS has partnered with the Public Guardian to influence adjudication, sentencing, and conditions of confinement for clients involved in the criminal justice system. Nationally, both public and private social services agencies have recognized the high incidence of incarcerated persons with mental retardation and initiated support programs rather than treating such individuals as "lepers" unworthy of services. See programs described at the following links - http://ici.umn.edu/products/impact/141/prof6.html ; http://www.arcnj.org/html/dd_offenders_program.html;

http://www.arcofkingcounty.org/guide/library/arccj.pdf;
http://www.soceco.uci.edu/users/joan/Images/offenders_MR.pdf; and
http://www.letsgetalifewv.org/Nadds_community_reporter_Feb._2006.pdf .

J. Discharge is authorized based on health or safety risks [§2.0(G)]. Since sex offenders "place(s) the health, safety or welfare of others in jeopardy or at risk", this standard would require DDDS to terminate services. The same problem exists for many Special Populations clients who may exhibit aggressive behavior. Indeed, the standard contemplates discharge of anyone engaged in SIBS since the client's health and welfare are in jeopardy or at risk. This exclusionary standard is simply "overbroad". Contrast 16 Admin Code 25050 ["To the extent eligibility is jeopardized by safety concerns, DSS will act affirmatively to eliminate or reduce unsafe conditions to an acceptable level through Departmental and community resources."] Health and safety risks should result in affirmative remedial efforts, not termination of eligibility.

K. Authorized termination for non-payment of justified charges is problematic. For example, clients and families may be liable for thousands of dollars for the cost of Stockley Center and other residential services pursuant to Title 29 Del.C. §7940. I am aware of no instance in which DHSS has barred eligibility for residential services at DPC or Stockley based on inability to pay such outstanding bills.

L. If a DDDS client resides in a supported apartment with a lease, DDDS cannot unilaterally terminate the lease or "evict" the client without complying with the Landlord-Tenant Code. If the DDDS client is a Section 8 tenant, there are also additional procedural protections applicable to "termination".

M. If DDDS is providing services pursuant to an ICT arrangement [Title 14 Del.C. §3124], DDDS cannot unilaterally terminate services which the ICT has directed, including case management and monitoring. The regulation does not recognize any exception in this context.

N. Section 2.0(J) makes no sense. For example, it literally authorizes termination of services for clients who are either non-residential or in foster care who do not participate in an ICAP. A client receiving only respite services would not even have an ICAP. Moreover, the standard authorizes complete termination based on non-participation (with or without fault) with any Divisional documentation requirement no matter how trivial. .

O. DDDS is involved with implementation of the IDEA-C program. Under Delaware's enabling legislation (Title 16 Del.C. Ch. 2), DDDS cannot unilaterally terminate IFSP-listed services and is subject to the separate Part C due process and appeal process. Moreover, there is some tension between the DDDS regulation and Title 16 Del.C. §216(3). The latter statute accords parents the "right to accept or decline early intervention services without jeopardizing eligibility for other early intervention services". Cf. 34 C.F.R. §300.324(c), addressing State agency participation in provision of transition services in IEPs under the IDEA-B. Finally, DDDS maintains MOUs with other agencies contemplating provision of coordinated services.

DDDS may violate the spirit, if not the letter, of such MOUs through unilateral termination of services.

P. The regulations do not address termination of services attributable to action of the PROBIS or HRC. For example, medications may be curtailed or restrictive program supports (e.g. helmet; gloves) discontinued by action of the PROBIS or HRC. The policy does not address what due process applies in such contexts, including client notice.

Q. CARF maintains due process standards which may vary by the particular context of accreditation (e.g. day vs. residential). DDDS should review the multiple CARF standards to assess compatibility with its proposed one-size-fits-all regulation.

Third, §3.0(C) implies that DDDS can delay issuance of a notice of right to a Medicaid fair hearing while internal review by the DDDS Appeals Committee occurs. This is ostensibly inconsistent with Title 42 C.F.R. §§431.206 and 431.221, especially if the status quo is not maintained during the pendency of proceedings. Parenthetically, §3.0 is deficient through failure to include any provision for maintenance of the status quo during the pendency of appeals, a common concomitant of due process. Compare 42 C.F.R. §431.230, 16 DE Admin Code 5308, Title 16 Del.C. §216(8), and Title 14 Del.C. §3143.

I recommend that the above observations be shared with DDDS and other interested agencies (e.g. DDC; GACEC; Arc; Easter Seal).

Attachments

E:807bils
F:pub/bjh/legis/2007p&l/807bils